IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 20, 2006

EMERY SINCLAIR v. STATE OF TENNESSEE

Appeal from the Circuit Court for Lawrence County
No. 23291 Stella L. Hargrove, Judge

No. M2005-01880-CCA-R3-PC _ Filed Janaury 23, 2007

Aggrieved of his guilty-pleaded voluntary manslaughter conviction, the petitioner, Emery Sinclair, sought post-conviction relief, which was denied by the Circuit Court of Lawrence County after an evidentiary hearing. On appeal, the petitioner presents one issue of ineffective assistance of counsel related to trial counsel's failure to move to gain suppression of a statement given by the petitioner to law enforcement officers. We affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Stanley K. Pierchoski, Lawrenceburg, Tennessee, for the Appellant, Emery Sinclair.

Robert E. Cooper, Jr., Attorney General & Reporter; David H. Findley, Assistant Attorney General; Mike Bottoms, District Attorney General; and James G. White, II, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On May 5, 2003, the petitioner pleaded nolo contendere to voluntary manslaughter in connection with the 2001 death of Floyd Price. Pursuant to a negotiated plea agreement with the State, the petitioner received an incarcerative nine-year sentence as a Range II offender with a 35 percent release eligibility date. From the transcript of the plea submission in the record before us, the stipulated factual basis was as follows: "This involved the stabbing of Floyd Price out on Barnsville Road here in Lawrenceburg, Tennessee back on October the 23rd of '01."

Thereafter, the petitioner pursued post-conviction relief claiming (1) that trial counsel rendered ineffective assistance of counsel in failing to adequately advise him about the plea offer and submission and in failing to challenge a recorded statement that the petitioner gave to officers investigating the Price homicide, and (2) that his plea was not intelligently and voluntarily entered.

An evidentiary hearing was held on July 7, 2005, to determine the merits of the petitioner's request for post-conviction relief.

At the post-conviction evidentiary hearing, the petitioner first offered the testimony of Debbie Riddle, the Chief Deputy Circuit Court Clerk for Lawrence County. She identified a document, purporting to be a transcript of an October 31, 2001 interview with the petitioner, which was contained in the petitioner's court file.

The petitioner called Tim Dickey, the former supervisor of investigations for the Lawrence County Sheriff's Department, who was involved in the investigation of Floyd Price's death. He testified that over a three- to four-year period of time, he worked with the petitioner, who was assisting law enforcement agencies in securing narcotics-related convictions. Mr. Dickey took a statement from the petitioner regarding the petitioner's involvement in Mr. Price's death. Mr. Dickey's memory, however, of the details surrounding the statement was vague, and the petitioner allowed Mr. Dickey to review the transcript from the court file.[1] From reviewing the transcript, Mr. Dickey remembered that the petitioner admitted to being the person who stabbed Mr. Price. Mr. Dickey did not independently recollect advising the petitioner of his constitutional rights prior to securing the statement, but Mr. Dickey testified that he believed other officers involved in the investigation had previously done so.

The transcript indicated that Investigators Christy Byrd and Jim Foriest were present when the recorded statement was taken, and the transcript noted that the recording device was turned off for 20 minutes at the beginning of the interview. Mr. Dickey testified that during the 20-minute hiatus, he discussed unrelated, ongoing federal drug investigations with the petitioner, and Mr. Dickey acknowledged that the petitioner had told him previously that he had received threats because of those investigations. Mr. Dickey recalled no requests during the 20-minute period by the petitioner for an attorney or signifying that he did not wish to give a statement, and Mr. Dickey pointed out from the transcript that the petitioner said he just wanted to get all of this mess over.

The transcript refers to earlier discussions between Mr. Dickey and the petitioner concerning Price's death. Mr. Dickey testified that he first discussed the matter with the petitioner "[s]tanding in the parking lot of the jail . . . smoking a cigarette." Mr. Dickey did not advise the petitioner of his rights at that time, but Mr. Dickey was informed that other investigators had done so.

At the petitioner's request, Mr. Dickey reviewed the interview transcript taken from the court file. Mr. Dickey agreed that from the numbering at the bottom of each page, it appeared that pages six, seven, eight, and nine were missing. Mr. Dickey did not know who transcribed the interview.

---

[1] The post-conviction court expressed puzzlement why the document was even part of the court file. The document did not bear a file-stamp date, and it did not appear to have been filed in connection with any specific pretrial motion.

On cross-examination, the State elicited from Mr. Dickey that the petitioner was not in custody when he gave the statement, and the petitioner was not arrested at the conclusion of the interview. Because of his previous investigative work with the petitioner, Mr. Dickey testified that it was not unusual to have discussions with the petitioner, and in Mr. Dickey's opinion, the petitioner was very familiar with the criminal justice system.

The petitioner testified in support of his request for post-conviction relief that after his arrest in November 2001 for the Price homicide, he secured release on bond. Because he could not afford an attorney, the court appointed counsel. The petitioner claimed that his meetings with trial counsel occurred "mainly" in the courtroom and that the first substantive conversation they had about the case was the day before his case was scheduled for trial. From the time of his arrest in 2001 until his plea submission in May 2003, the petitioner testified that he "had talked to [trial counsel] several times on the phone [to] relay things that . . . [trial counsel] needed to look into." By way of example, the petitioner said he asked trial counsel to interview Dave Wolden, the bartender at Club 64, where he first met Mr. Price, because the bartender would say that Mr. Price had a gun in a bag and "was acting all crazy" as if "he was going to rob the bar." The petitioner testified that counsel later told him it "wouldn't really be necessary" to interview any witnesses because the State would provide any statements.

The petitioner stated that he wanted "to plead self defense," but trial counsel "pretty much" told him that in Tennessee "there is not really a self-defense plea that you can plead." The petitioner testified that this conversation occurred on Friday, May 2, the weekend before the scheduled May 5 trial. The petitioner also testified that May 2 was the first time he was provided any discovery materials to review and the first time a plea was mentioned. The petitioner testified that he felt pressured at the May 2 meeting because trial counsel told him that "Monday's [the] trial date or plea day" and that they had "to do one or the other."

Regarding a plea offer, the petitioner stated that the first plea offer he ever heard was at the May 2 meeting, and the offer involved a sentence of 15 to 25 years. The petitioner rejected that offer, and the petitioner testified that, in his presence, trial counsel called the district attorney general. At the call's conclusion, trial counsel told the petitioner that the sentencing offer had been lowered to nine years as a Range II offender if the petitioner would plead to voluntary manslaughter. The petitioner testified that counsel encouraged him to accept the offer, but the petitioner claimed that counsel did not adequately explain to him the Range II classification and led him to believe that he would serve only two years and seven months before automatically being released. The petitioner testified that he accepted the offer because the state was willing to give him 30 days to "get [his] affairs in order and take care of business" before going to jail.

Regarding the statement he gave to Mr. Dickey, the petitioner testified that they first spoke on the telephone, and Mr. Dickey asked if the petitioner knew anything about Mr. Price. The petitioner said that when he responded in the affirmative, Mr. Dickey replied, "[W]ell why don't you come on down here, and we'll talk about it." The petitioner drove to the Sheriff's Department and first spoke with investigators in the parking lot where the investigators inspected the damage to his

vehicle that the petitioner claimed occurred as he was acting in self-defense. After the vehicle inspection, the petitioner and the investigators went inside and "talked about it." The petitioner recalled that the conversation was recorded although the recording device was "turned off a couple of times." The petitioner identified the transcript from the court file as what he received in discovery.

The petitioner testified in a rambling fashion that during the 20-minute pause in the recording an attorney was discussed, but one of the investigators told him that an attorney was unnecessary if he wanted to give a statement. The petitioner testified that he "didn't really think it was . . . that big a deal . . . whether [he] had an attorney or not at that point." The petitioner also testified that he told trial counsel about what happened during the 20-minute period.

As for the accuracy of the transcript, the petitioner opined, "[W]hat's said here, was said, but there are other things that explain some of this that were left out." The petitioner testified that the copy of the statement provided in the discovery materials also was missing four pages.

The petitioner summed up his position in the following fashion:

> I would rather take a trial than know that I'm setting [sic], you know, in prison, doing more time than I should have done, even if I had of, you know, took a deal on it. And especially for something that, you know, I was in the right on. I know in my mind and in my heart I was in the right. This man attacked me, and you know, I'm going to set [sic] in prison for years, all because I was scared into, you know . . . .

On cross-examination, the State pointed out that upon his arrest, the petitioner told the court that he could not afford an attorney, whereas at the plea submission he told the court he was working and had two houses under construction. Upon the State's questioning, the petitioner acknowledged pleading guilty twice in Michigan to felony offenses and pleading guilty in Lawrence County to three felonies. The petitioner's response, however, was incoherent when asked about knowledge he gained from prior pleas, particularly on sentencing matters. Regarding his responses at the plea submission, the petitioner claimed he was just following his attorney's instructions.

The petitioner's former trial counsel testified that he recalled meeting with the petitioner 10 to 12 times; most meetings were in court, and two of the meetings occurred in counsel's office. Trial counsel estimated that of the meetings, lengthy conversations took place "about two times." Counsel had no present recollection when he received discovery materials from the state, but counsel remembered that he reviewed all of the discovery materials with the petitioner during one of the office meetings.

Trial counsel testified that "there had been many different discussions with the District Attorney General's office, dealing with plea bargains, prior to the one that was struck." Trial

counsel said that the petitioner "was always interested in the possibilities of a plea offer." Had the case proceeded to trial, the defense strategy would have been self-defense. In that event, the petitioner would have needed to testify. Trial counsel believed that he used the petitioner's cooperation in law enforcement investigations "as leverage to try to get a decent plea offer."

Trial counsel was shown the transcript from the court file. He recognized the document and recalled the 20-minute gap in the recording. Trial counsel thought he probably asked the petitioner what occurred during that time period, but he had no recollection of any response. Trial counsel did remember that he spoke with the petitioner about all of the exchanges he may have had with law enforcement officers. Trial counsel testified that other than the transcribed discussion, his impression was that formal statements were not taken; rather, officers simply asked the petitioner about his knowledge or involvement in the Price homicide.

Trial counsel acknowledged that he never moved to suppress the petitioner's statement. In the petitioner's statement and from conversations with the petitioner, trial counsel testified that the petitioner never denied stabbing Mr. Price; the petitioner insisted that he was acting in self-defense. Trial counsel adamantly denied ever telling the petitioner that self-defense did not exist in Tennessee. Trial counsel believed that self-defense in the petitioner's case would have turned on the petitioner's trial testimony, and counsel recalled performing no investigation other than what was based on the petitioner's statement. Trial counsel testified that the state had subpoenaed a considerable number of witnesses for trial, including the bartender at Club 64.

Trial counsel's recollection of the State's final plea offer was that after he communicated the offer; the petitioner wanted "to think about it" and talk to certain people. The petitioner left counsel's office and later returned with a decision to accept the offer.

On cross-examination, trial counsel testified that he recalled no problems receiving discovery materials in the petitioner's case. Typically, the State provided such materials "very quickly." In trial counsel's opinion, when the petitioner accepted the State's final plea offer, he "knew exactly . . . [what] he was doing and was satisfied with it."

At the conclusion of his testimony, trial counsel mentioned to the post-conviction court that the transcript from the court file was incomplete. Trial counsel did not have his entire file with him, but he felt certain that his file copy contained all ten pages of the statement.

When the evidentiary hearing concluded, the post-conviction court took the matter under advisement and on July 18 entered an order dismissing the petition for post-conviction relief. The post-conviction court made comprehensive findings; it accredited the testimony of trial counsel, finding that the petitioner "had excellent representation by an experienced, skilled and very thorough and conscientious assistant public defender." The court further found that trial counsel "was dealing with a client who had considerable familiarity with criminal proceedings" and that the petitioner's rights "were protected and safeguarded at every stage of the proceedings." The post-conviction court

referred to the transcript of the plea submission as support that the petitioner freely, voluntarily and knowingly entered his plea under the agreed terms.

The petitioner filed a timely appeal, and the matter is properly before this court. We note at the outset that the petitioner has confined his appeal to the issue whether he failed to demonstrate ineffective assistance of trial counsel in connection with counsel's failure to move to suppress the statement to the investigators.

In post-conviction proceedings, the petitioner has the burden of proving by clear and convincing evidence the claims raised. T.C.A. § 40-30-110(f) (2006). On appeal, the lower court's findings of fact are reviewed de novo with a presumption of correctness that may only be overcome if the evidence preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997).

When a petitioner challenges the effective assistance of counsel, he has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Deficient representation occurs when counsel's services fall below the range of competence demanded of attorneys in criminal cases. *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994). On review, there is a strong presumption of satisfactory representation. *Barr v. State*, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995). If prejudice is absent, there is no need to examine allegations of deficient performance. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

In evaluating counsel's performance, this court does not examine every allegedly deficient act or omission in isolation, but rather we view the performance in the context of the case as a whole. *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The primary concern of the court should be the fundamental fairness of the proceeding of which the result is being challenged. *Id*. Therefore, this court should not second-guess tactical and strategic decisions by defense counsel. *Henley*, 960 S.W.2d at 579. Instead, this court must reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. *Id*.; *see also Irick v. State*, 973 S.W.2d 643, 652 (Tenn. Crim. App. 1998).

We agree with the post-conviction court that the petitioner failed to sustain his claims of ineffective assistance of counsel by clear and convincing evidence. On appeal, the petitioner persists in his assertion that the 20-minute gap in the tape recording and the missing transcribed pages of his statement would have jettisoned the statement from the state's case had a suppression motion been filed. He cites no legal authority in support of that contention. We observe, first of all that the petitioner has not shown that the State was involved in the destruction of any evidence, such as would trigger an inquiry pursuant to *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). Trial counsel stated at the post-conviction hearing that he recalled receiving a complete copy of the petitioner's statement from the State. The petitioner merely demonstrated that, for no discernable reason, a

partial transcript of his statement was in the court file. Additionally, in our opinion the 20-minute period during which tape recording was suspended addresses the weight, not the admissibility, of the statement. *See State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001) (rejecting the argument that failing to electronically record interrogations requires suppression of any statements resulting from the interrogations).

During his testimony, the petitioner did maintain that his need for an attorney was discussed during the 20-minute recording hiatus. The petitioner, however, completely failed to demonstrate that he was subjected to a custodial interrogation. *See State v. Rogers*, 188 S.W.3d 593, 606 (Tenn. 2006) (recognizing that the constitutional protection again self-incrimination extends to the presence of counsel during police-initiated custodial interrogation). Even had he carried this burden, however, it was the province of the post-conviction court to assess the credibility of his claim that an attorney was discussed. The post-conviction court obviously did not credit that testimony, and we will not second-guess that assessment.

When the basis for alleging ineffective assistance of counsel is based on the failure to file some motion, a petitioner must demonstrate that that the motion was meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 2583 (1986) (where failure to litigate suppression is basis of ineffectiveness claim, defendant must also prove suppression motion is meritorious); *Gary Randall Yarnell* v. State, No. E2004-01762-CCA-R3-PC, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 15, 2005), *perm. app. denied* (Tenn. 2006). As we have explained, the record abundantly supports the conclusion that the petitioner failed to carry this burden required for post-conviction relief.

For all the foregoing reasons, we affirm the post-conviction court's order dismissing the petition.

_____

JAMES CURWOOD WITT, JR., JUDGE